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[Dixon, William M.](#) (2014) Compensation sought for an improper caveat. *The Queensland Lawyer*, 34(3), pp. 111-113.

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Compensation Sought for an Improper Caveat

Re Brooks' Caveat [2014] QSC 76 is a decision of Henry J delivered on 24 April 2014. The decision considers the operation of s 130 of the *Land Title Act 1994* (Qld). That section provides that a person who lodges or continues a caveat without reasonable cause must compensate anyone else who suffers loss or damage as a result.

Facts

The applicant sought orders for the removal of a caveat over a commercial and residential property at Mission Beach ('the property') and for the payment of compensation under s 130 of the *Land Title Act 1994* (Qld).

The applicant trustees were the two executors of the will of Victor Brooks who died in June 2006. The will provided for the deceased's property to be held on trust for the lifetime of one of the applicant executors, Dorothy Brooks, and upon her death to be held on trusts in shares including a half share to give to the deceased's daughter from a previous marriage, Davina Brooks, upon her turning 30 years old. At the time of the application, Davina Brooks was only 27 years old.

Shortly before the deceased's death, the property, which was uninsured, was damaged by Cyclone Larry. Thereafter, Dorothy Brooks spent a significant amount of money in restoring the property and paying rates and insurance, both of which had increased significantly. At the same time, the rent derived from the property was significantly reduced. After receiving financial advice, Dorothy Brooks decided that she could no longer maintain the property. This decision was communicated to Davina Brooks. Dorothy Brooks and her co-executor and co-trustee, a solicitor, decided to sell the property by way of auction under powers given to them under ss 31 and 32 of the *Trusts Act 1973* (Qld). This decision was also communicated to Davina Brooks along with the executors' advice that they did not consider that they were required to seek, and did not intend to seek, the consent of the beneficiaries or an order of the Court before taking such action.

As noted by Henry J, an absence of reassurance of Davina Brooks about how the trustees proposed to protect her significant future beneficial interest in the property they were proposing to sell would have done little to assuage her concerns.

The applicant executors made arrangements for the marketing and auction of the property to occur on 22 March 2014. After having taken legal advice, Davina Brooks lodged a caveat over the property. Due to the caveat not being withdrawn, the auction was cancelled. The applicants sought compensation pursuant to s 130 for money thrown away due to the cancellation in the amount of \$3,232.20 being the auction advertising costs.

Reasonable Cause

Henry J carefully considered the meaning of the statutory words 'without reasonable cause' and approved previous authorities to the effect that a caveator need not possess a caveatable interest as a matter of law. Rather, reasonable cause for the lodgment or continuance of a caveat will be shown where the caveator honestly believes, on reasonable grounds, that a caveatable interest is held. To this extent, the decision may be considered unremarkable. However, the decision assumes

greater significance in considering the impact, if any, of the word 'improper', as it appears in the heading to s 130.

Improper Purpose?

As noted by Henry J, the most authoritative previous Queensland decision in respect of the meaning of s 130 was the decision of Demack J in *Farvet Pty Ltd v Frost* [1997] 2 Qd R 39 ('*Farvet*'). Demack J regarded the use of the word 'improper' in the heading to s 130, which is part of the section by reason of s 35C of the *Acts Interpretation Act 1954* (Qld), to introduce an additional requirement. Demack J considered that compensation should only be claimable if the caveat was lodged or continued **both** improperly and without reasonable cause.

After the decision in *Farvet* was handed down, s 130(3) of the *Land Title Act 1994* was amended to make it clear that the person who lodged or continued a caveat had the onus to prove that the caveat was lodged or continued with reasonable cause. However, the heading to s 130 and its reference to an 'improper caveat' remain unchanged. The issue for Henry J was whether the earlier reasoning of Demack J remained persuasive? In this regard, Henry J opined as follows (at [17] and [18]):

Given the onus now falls to the caveator to prove reasonable cause, the question arises whether it is appropriate to apply the reasoning in *Farvet Pty Ltd v Frost* in reverse, so as to require the caveator to prove the caveat was lodged and continued both with reasonable cause and without any improper purpose. I would not adopt such a test. Section 130(3) takes the exceptional course of specifically imposing a presumption that a caveator has acted without reasonable cause. I interpret the reference to impropriety in the section's heading as being no more than a short form reflection of that adverse presumption. It would be contrary to the words of sub-s (3) to cast the onus upon the caveator of proving anything more than what the subsection requires. Thus a caveator must only prove the caveat was lodged or continued with reasonable cause.

It will likely be an incident of such proof that it is also proved the caveat was lodged or continued without any improper purpose, but proof of absence of improper purpose is not of itself a requirement of s 130(3).

Having diverged from the earlier approach of Demack J, Henry J acknowledged that the potential circumstances of cases involving caveats were so varied as to make it impossible to prescribe the circumstances under which a caveator may be able to discharge the onus imposed by s 130(3).

In relation to the divergence of views in other states as to whether the existence of a caveatable interest can of itself provide proof of reasonable cause, Henry J opined (at [19]):

The question pursuant to s 130(3) is not whether the caveator had a caveatable interest but whether it has been proved the caveator had reasonable cause for lodging or continuing the caveat. The existence of a caveatable interest may often afford proof of reasonable cause but, again, the circumstances of individual cases are potentially so variable that it cannot be assumed proof of a caveatable interest will of itself always be sufficient to prove reasonable cause. In the same vein, the presence of an ulterior or improper purpose on the part of the caveator with a caveatable interest may bespeak an absence of reasonable cause but whether it in fact does so is dependent upon the individual circumstances of the case, particularly if it is a case where a caveator has a mixture of motivating purposes.

Decision

In seeking to apply the law as stated, the first issue for determination by Henry J was whether Davina Brooks had reasonable cause to *lodge* a caveat?

In answering this question in the affirmative, Henry J noted with approval that the better view is that an interest in the nature of a mere equity is sufficient to support a caveat at least in circumstances

where equity would protect the interest by remedies that affected the land in question such as an injunction to restrain a dealing with the land contrary to the rights asserted by the holder of the mere equity. In relation to the interest asserted by Davina Brooks, which was a beneficial interest under a trust, Henry J observed (at [40]):

Under the terms of the will the trustees are specifically obliged to hold 'the property' on trust for Dorothy Brooks during her lifetime and upon her death are specifically obliged to hold the property upon trust as to a one-half share to give to the respondent when she turns 30. The respondent's interest may be yet to ripen but it is no mere interest in a discretionary trust. It is reasonably arguable, notwithstanding that it is an interest in 'the property' which will ripen in the future, that it is an interest of sufficient certainty to ground a present right to protect that interest. It is at least reasonably arguable the respondent would have standing to make application for an injunction restraining the sale of the property pending an order under s 98 of the *Trusts Act*. Her reasonably arguable right to protect her interest in that way provides reasonable grounds for a belief that she has a caveatable interest and reasonable cause for lodging the caveat.

As Henry J was satisfied that there was a reasonable argument that there was a caveatable interest and thus reasonable grounds to believe that a caveatable interest existed, there was no necessity to make a final determination as to whether Davina Brooks in fact held a caveatable interest.

The second issue for determination by Henry J was whether Davina Brooks had reasonable cause to *continue* the caveat?

Once again, this question was answered in the affirmative. Given that Davina Brooks' interest was ongoing, Henry J opined that there was satisfactory evidence of reasonable cause for continuing the caveat unless there was some development in the dispute between the parties which detracted from the force of the argument that reasonable cause persisted.

Although the caveat was requisitioned by the Registrar of Titles and eventually withdrawn, Henry J noted that this did not mean that the caveat had earlier been continued without reasonable cause. Nor did the facts suggest any ulterior motive or improper purpose behind the caveat being continued up until the auction was cancelled. Rather, up until the cancellation of the auction, Davina Brooks continued to believe on reasonable grounds, as identified previously, that she had a caveatable interest.

Given that Davina Brooks had discharged the onus cast upon her by s 130(3) of proving that the caveat was lodged and continued with reasonable cause, the application for compensation was dismissed.

Comment

In this decision, Henry J has expressly rejected the suggestion that there is a separate statutory requirement for a caveator to prove a caveat was lodged and continued without any improper purpose in addition to proving that the caveat was lodged and continued with reasonable cause in order to deny a successful compensation claim. To this extent, the decision evinces a clear departure from the reasoning of Demack J in *Farvet*.

With respect, there is much to be said for the approach of Henry J. As noted elsewhere, the conclusion reached in *Farvet* has been the subject of criticism.¹ In a similar vein to the comments made by Henry J, it has been suggested that the word 'improper' as it appears in the heading to s 130 simply means without reasonable cause. Further, notwithstanding the relevant provision in the

¹ Christensen, Dixon and Wallace, *Land Titles Law and Practice*, Thomson Reuters, [7.5090].

Acts Interpretation Act 1954, it is by no means clear that words in a heading can operate to enlarge words contained in a section of an Act. In addition, it may be suggested that, to the extent of any inconsistency, the words in the section should be paramount.²

Unfortunately, in terms of precedent, what remains are the competing views of two judges at first instance. Until such time as the matter is definitively determined, a caveator, faced with a claim for compensation under s 130, will remain well advised to be in position to demonstrate that the caveat was not lodged or continued with an improper purpose as well as demonstrating reasonable cause. While this may not be strictly necessary as a statutory requirement, if Henry J's views are preferred, it may nevertheless assist a caveator to discharge the presumption imposed by s 130(3).

Dr Bill Dixon

² Id.